Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

1. Appellant's motion for leave to intervene was timely.

The Government does not question the timeliness of the motion.

The Warner Appellees appear to contend that Appellant was on notice from the time of the commencement of the action in 1938 that the guaranty which it seeks to protect was in jeopardy and should not be permitted to postpone a motion for leave to intervene until the eve of final judgment (Br. pp. 2-4).

The premise is not sound. Appellant was not a party to the action. It had no notice of its commencement or of any of the proceedings subsequently had therein. But assuming knowledge on the part of Appellant that the Govern-

ment's complaint prayed for a divorcement of production and exhibition, that was not notice to Appellant that its rights in respect of the guaranty were involved. Such divorcement could be accomplished without a dissolution of Warner and without destroying Appellant's guaranty.

An attempt on the part of Appellant to intervene in the cause at any time before its rights were threatened would have been premature. It was not until the formulation and presentation to the court of the proposed Consent Judgment which provided for the divorcement of production and exhibition by means of a reorganization requiring a transfer of Warner's assets to two new companies and the dissolution of Warner, that there was any threat to Appellant's rights.

2. Appellant "is or may be bound" by the Consent Judgment.

With respect to Clause 2 of Rule 24(a), the Government makes no claim that Appellant's interest is adequately represented and argues only that Appellant is not "bound" by the decree.

If the Government's construction of the phrase "is or may be bound by a judgment in the action" were to be adopted, Clause (2) would be rendered virtually meaningless. The argument of the Government is that in an action *in personam* one is bound by a judgment only where it operates against him as *res judicata* of his rights, and that a judgment so operates only against parties to the cause and persons in privity with them and not against persons whose rights are adverse (Br., pp. 15-16).

Obviously an applicant for intervention is not a party to the cause and no judgment entered in the cause could ever operate as *res judicata* of his rights. Privity in connection with the doctrine of *res judicata* applies only to

persons who have succeeded to the rights of parties to the action subsequent to its commencement. 50 C. J. Sec. page 324.

Plainly the rule was never intended to have so narrow an application. The language relied upon by the Government in *Cameron* v. *President and Fellows of Harvard College,* 157 F. (2d) 993 (C. A. 1st, 1946) (Br., p. 17) is not supported by any citation of authorities in the opinion or by the Government in its brief.

Far from applying a strict and narrow interpretation of the term "bound", the courts have made it clear that Rule 24(a)(2) is to be liberally interpreted, and that the term "bound" as used in the Rule is not the narrow concept of *res judicata* as the Government contends. (Br., p. 16)

Persons who may only be indirectly bound and whose interests are adverse to, rather than in privity with, the parties to the main action, are entitled to intervention as of right under Rule 24(a)(2). *United States* v. *C. M. Lane Lifeboat Co., Inc.,* 25 F. Supp. 410, 411 (E. D. N Y., 1938), aff'd 118 F. (2d) 793 (C. A. 2nd, 1941), Pet. for cert. dis. 314 U. S. 579 (1941); *Wolpe* v. *Poretsky,* 144 F. (2d) 505, 507 (C. A. D. C., 1944); *Champ* v. *Atkins,* 128 F. (2d) 601, 602 (C. A. D. C., 1942); *White* v. *Douds,* 80 F. Supp. 402, 405 (S. D. N. Y., 1948). Indeed, the clause "is or may be bound" in this subdivision of Rule 24(a) has been interpreted as requiring only that the intervenor be "affected" by the decree. *Mack* v. *Passaic National Bank & Trust Co.,* 150 F. (2d) 474, 477 (C. A. 3rd, 1945).

In *United States* v. *C. M. Lane Lifeboat Co., Inc., supra,* intervention was allowed to a petitioner whose interest was adverse where the judgment "though it would not directly bind the petitioner, would in the last analysis, do so indirectly." (25 F. Supp. at p. 411)

The contention of the Government is in direct conflict with the decision of this Court in *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194 (1915), (Appellant's Main Br., p. 24). The action was an *in personam* antitrust action. Any judgment therein would not be *res judicata* as to the petitioners, and there was no privity. Nonetheless the petitioners were entitled to intervene on the ground that the decree "might operate prejudicially to their rights". See also an article on intervention by Raoul Berger, 50 *Yale L. J.* 65, at page 85.

With respect to the words "is or may be bound by a judgment in the action" it is stated in 6 *Cyclopedia of Federal Procedure* (2nd ed.) page 488:

> "A natural meaning would of course be that they imply *res judicata*. But a more rational point of view for the purposes at stake is that they need mean only that the effect of the judgment would be prejudicial. So construed, they merely carry into present practice the orthodox requirement of intervention practice generally that the nature of the intervener's interest must be such that he will gain or lose by the operation of the judgment."

The prejudicial effect of the judgment on Appellant's rights is pointed up by the inconsistencies in the Government's Brief itself. The Government in one breath states that the Consent Judgment here does not bind Appellant (Br., p. 15 *et seq.*) and in the next, in response to the suggestion that Appellant is entitled to an assumption of the guaranty by the two new companies, it says (Br., p. 26) "The parties to the main action regard the consent decree as barring assumption of Warner's guaranty by the new picture company * * *."

The Government's argument (Br., pp. 18-19) that Appellant is free to assert in other proceedings the rights which it has under the guaranty will be discussed later. (*Infra*, pp. 10-11)

The argument of the Government that "the new theatre company's guaranty (through assumption of Warner's guaranty) should be found to constitute a full equivalent" (Br., pp. 19-20); and the argument of the Warner Appellees that the petition alleged no facts to show that the guaranty of the new theatre company would not be a reasonable equivalent (Br., pp. 5-6), have no foundation in fact and are not relevant to the issues presented.

There is no such thing as a guaranty of the new theatre company, and contrary to the statement in the brief of Warner Appellees (pp. 1, 5), no such guaranty has been tendered. Warner has not agreed to cause the new theatre company to give any such guaranty. It is under no obligation to do so, and the Consent Judgment does not require it. The suggestion that such a guaranty might be forthcoming was gratuitously made by counsel for the Government upon the argument in the statutory court (R. 218, fol. 208-21), and such a guaranty has been the subject of informal discussion. It has no more substance than that.

In any event, this is not the time nor the forum for a discussion of what would or what would not be an equivalent substitute for the Warner guaranty consistent with the purposes of the Consent Judgment. Contrary to the assumption of Warner Appellees (Br., pp. 1-2) the court has exercised no discretion in respect of that issue. It can only be determined by a trial of the issues involved in Appellant's pleading in intervention and a judicial decision rendered upon the evidence submitted. The only issue here is whether or not Appellant has a right to intervene in the cause to have the merits of its claim judicially determined.

3. The property of Warner is "subject to the control or disposition of the Court" and Appellant is "adversely affected" by the "distribution or other disposition" of said property.

As to the alternative ground for intervention provided for by clause (3) of Rule 24(a), the Government contends that it is applicable only where there is a *res* which the court is administering or exercising control over and where the intervenor has an interest therein (Br., pp. 21-23). To support this contention it argues that the action against Warner is *in personam* and that its failure to make the transfers of property provided for in the Consent Judgment, even though punished by citation for contempt, would not vest title to the property in the court.

In Appellant's main brief (pp. 19-20) it has been shown that the court below exercised as effective control over the property of Warner by directing its transfer to the two new companies as if it had actually taken possession of the property through a receiver or trustee.

To punish as a contempt any failure to transfer the properties as directed would probably be the least effective method of enforcing the Consent Judgment. A direct and more effective method would be to appoint a receiver or trustee and direct him to make the requisite transfers. Jurisdiction to invoke this procedure has been reserved.

Although the action may be technically one *in personam*, it partakes of many of the aspects of an action *in rem* by reason of its direct effect upon the disposition and distribution of the Warner properties, and if occasion requires can readily be converted into an action *in rem*.

The right to intervene under clause (3) is not limited to *in rem* actions and in actions where the disposition of property is or may be involved, intervention under clause (3) is permitted. *Tift* v. *Southern Railway Co.*, 159 Fed. 555, 558 (S. D. Ga., 1908).

Clause (3) does not specify that the intervenor must have an interest in the property in order to be "adversely affected". The broad inference sought to be drawn by the Government from its quotation (Br., p. 24) of dicta from the opinion of this Court in *United States* v. *California Canneries*, 279 U. S. 553, 556 (1929), that to intervene as of right the applicant must have "a direct and immediate interest in a *res* which is the subject of the suit" is unjustified. Ohlinger in his discussion of the Rule (3 *Ohlinger's Fed. Prac.*, 1948 ed., p. 482) says that such an inference "is not borne out by other decisions of the Supreme Court, nor by the decisions of the federal courts generally • • • ", and cites and discusses numerous cases supporting the text.

Following the quotation by the Government (Br., p. 23) from 4 *Moore's Federal Practice*, page 45, with respect to the nature of an interest which will support an application for intervention, the text continues (pp. 45-46):

> "It is not always easy to draw the line as to when an interest is sufficient to give a lien for this purpose; but the tendency of the cases is apparently towards a liberal definition of ownership and lien."

After referring to certain cases where an absolute right to intervene obtained, the author said (pp. 47-48):

> "But in another class of cases the petitioner's interest arises from an atypical transaction, and the lien, if any, depends upon equitable considerations. Thus, Indiana in building the Wabash & Erie Canal incurred certain indebtedness to Robertson for the performance of work on the canal, and to Johns for the destruction of his water right. It was agreed that an amount of money should be payable to Robertson out of rent received through the operation of the canal, and that Johns should be furnished a certain amount of water, rent free. Later,

> the state, to meet the expense of building the canal, issued certificates of indebtedness. The holders of these certificates having brought a bill in equity which resulted in a sale of the canal, it was held that persons in the position of Robertson and Johns had an absolute right to intervene in the equity proceedings. [*French* v. *Gapen*, 105 U. S. 509 (1881)] The lessor of a non-assignable lease, who alleged that he was owed a sizable amount for maintenance of the leased railroad, was held to have an absolute right to intervene in receivership proceedings, because the receiver had sold the lease and, furthermore, had made no provision for preferring the debt incurred by maintenance. [*Vicksburg, S. & P. Ry. Co.* v. *Schaff*, 5 F. (2d) 610 (C. C. A. 5th, 1925)] A petitioner claiming a contingent fee was said to have a like right of intervention in an accounting suit upon the theory of a lien on the fund in court. [*Barnes* v. *Alexander*, 232 U. S. 117 (1914)]"

In the last cited case, Mr. Justice Holmes, referring to the attorneys' contingent fee claim, said:

> "Even if their lien was only inchoate when the suit was begun, which we do not intimate, they had a right to protect their interest and of course were not deprived of it by the plaintiff's reaching the result that they also desired. Having a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes" (232 U. S., at p. 123).

An equitable lien arising out of a contract, inchoate until judgment, relates back to the commencement of the action and affords a basis for intervention under Rule 24(a)(3). *Friedman* v. *Harris*, 158 F. (2d) 187, 188 (C. A. D. C., 1946); *Continental Casualty Co.* v. *Kelly*, 106 F. (2d) 841, 843 (C. A. D. C., 1939).

The transfer of the assets of Warner directed by the Consent Judgment gives rise to an equitable lien in favor of Appellant as a contingent creditor of Warner. *Cole* v. *M. I. Co., et al.*, 133 N. Y. 164 (1892); *Hurd* v. *N. Y. & C. Steam Laundry Co.*, 167 N. Y. 89, 95-96 (1901).

4. Appellant was entitled to permissive intervention and a denial thereof was an abuse of discretion.

The primary requirement for permissive intervention under Rule 24(b) is that the "applicant's claim or defense and the main cause have a question of law or fact in common." When the Court determined to decree the dissolution of Warner and the dispersion of its assets, it became necessary to a final disposition of the cause to frame a decree to carry that determination into effect. Two new issues were inherent in the framing of a lawful decree: First, an issue of fact as to whether such a decree would impinge upon the rights of third parties; and second, an issue of law as to the power of the Court to destroy or impair such rights. The issues were present. They cannot be eliminated merely by the failure of the parties to raise or contest them and the denial of intervention by any injured party who desires to do so. Those are the issues common to the Appellant's claim and the main action which Appellant claims the right to litigate.

Appellant has also pointed out (Br. in opposition to motions, pp. 6-7; Main Br., p. 22) that the granting of the application to intervene would have resulted in no delay in the entering or carrying out of the Consent Judgment. The relief to which Appellant is entitled in respect of its claim can be awarded by a supplemental order or orders without any modification of the Consent Judgment or delay in carrying out the plan of reorganization therein required. What is involved in Appel-

lant's intervention is the judicial ascertainment of the equivalent substitute for the Warner guaranty and the attaching of liability therefor on the transferee or transferees of the Warner assets.

Denial to Appellant of the right to intervene where, as here, no delay or prejudice to the adjudication of the rights of the original parties is involved, and particularly where, as has been shown (Main Br., pp. 25-27; and see discussion under 5 below), Appellant has no other adequate remedy, constitutes an abuse of discretion.

The marked difference between the situation of Appellant and contract creditors of Warner generally and the very substantial difference in the effect of the Consent Judgment on Appellant's rights and interest as contrasted with theirs, were pointed out in Appellant's main brief, pages 22-23.

5. Appellant has no adequate remedy except by intervention.

That there will be no court proceedings on dissolution of Warner (Appellant's Main Br., p. 27) is substantiated by the recitals in the Warner Proxy Statement (p. 8) that "under the Delaware statutes under which Warner is incorporated, such dissolution will require the affirmative vote of the holders of two-thirds of the stock having voting power. Since dissolution of Warner is an integral part of the Plan, an approval of the Plan will also require such two-thirds vote". It finds further substantiation in the affidavit of Edward K. Hessberg (R. 224) which was the basis of the order of severance of the Warner defendants herein, and which stated that the stockholders' meeting had been held and that more than 75% of the stock was voted in favor of approving the Plan of reorganization.

The Government's suggested remedy (Br., p. 39, footnote) of a proceeding on equitable principles against Warner's transferees after default by Appellant's lessee, has been shown to be wholly inadequate (Main Br., p. 26).

A determination in a declaratory judgment action against the Warner defendants, the other remedy suggested by the Government, would not be binding on it. If in such action the equivalent substitute for the Warner guaranty were adjudged (in accordance with conceded equitable principles) to be the guaranties of both transferee companies, or if otherwise the decision were considered by the Government to be inconsistent with the Consent Judgment, it would doubtless apply under the reservation of jurisdiction clause of the Consent Judgment for injunctive relief against Warner and/or the transferee companies. Such application presumably would not be contested by Warner and Appellant's declaratory judgment would be nullified by injunction.

6. The Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law.

The brief dismissal by the Government (Br., pp. 41-42) of Appellant's due process contention (Main Br., pp. 30-32) ignores the lack of notice to Appellant as an important element of due process, erroneously assumes that the hearing on Appellant's application to intervene is equivalent to a hearing on the merits of the issues of Appellant's claim, and repeats its contention that the judgment does not foreclose Appellant with respect to its rights under the Warner guaranty.

Conclusion.

The court below erred in denying Appellant's application for intervention and the relief specified in the Conclusion to Appellant's main brief should be granted.

Respectfully submitted,

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